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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1561

CONTINENTAL/MOSS-GORDIN, ET AL.,

Petitioners,

v.

B-M-G INVESTMENT COMPANY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

CONTINENTAL/MOSS-GORDIN, ET AL.,

Petitioners,

v.

B-M-G INVESTMENT COMPANY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Continental/Moss-Gordin, Inc., Fulton Industries, Inc., and Allied Products Corporation, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in the above styled cause only insofar as such judgment affirmed in part the opinion of the United States District Court for the Northern District of Texas.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported and is attached hereto as Appendix "A" along with the order of that Court denying Petitions for Rehearing and the order staying the mandate. The final judgment of the District Court is attached hereto as Appendix "B." The District Court filed a memorandum opinion which appears as part of the certified record which Petitioners have received from the Clerk of the Court of Appeals and which is filed herewith.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 14, 1971. Timely Petitions for Rehearing were denied on February 19, 1971. The order staying mandate was filed March 10, 1971. This petition for certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Whether the language in a lengthy and complex Purchase Agreement, having to do with what constituted events of default under such agreement, was so clear and unambiguous that the case could be properly disposed of on motion for summary judgment and without the necessity of trial on the merits in which Petitioners would have had the opportunity to introduce testimony to show that no event of default had occurred within the intention of the parties to the agreement.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure Rule 56(c), 28 U.S.C.A., dealing with motion for summary judgment. The pertinent part of such Rule reads as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF FACTS

Continental Gin Company (Continental) and Moss-Gordin Company (now B-M-G) are parties to a Purchase Agreement entered into in 1964. Fulton Industries, Inc. (Fulton), owner of substantially all of Continental's stock, guaranteed Continental's obligations under the Purchase Agreement.

Continental purchased assets and properties from B-M-G, paid a portion of the price at closing and agreed to make contingent additional payments *up to* $2,291,334. A formula was established for payment of the balance of the purchase price but Continental agreed to pay *at least* $1,000,000 of the contingent additional purchase price.

Prior to institution of this suit, Continental had paid $320,000, leaving an unpaid contingent balance of $1,686,305 of which the *guaranteed minimum* balance was $680,000. In 1968, Allied Products Corporation (Allied) made an agreement with Fulton whereby Allied acquired substantially all of Fulton's assets. As part of the Allied-Fulton Agreement, Fulton adopted a plan of complete liquidation and Allied assumed Fulton's liabilities.

Respondents sued Petitioners, claiming the adoption of the plan of complete liquidation by Fulton was an "event of default" under the Purchase Agreement, causing acceleration of the $680,000 guaranteed portion of the contingent remaining purchase price.

A more detailed statement of facts is contained in the Appendix prepared in the Court of Appeals and which is part of the certified record filed herein. The case was originally filed in the State District Court of Texas and was removed to the United States District Court for the Northern District of Texas by Petitioners based upon diversity of the parties.

REASONS FOR GRANTING THE WRIT

A motion for summary judgment is an effective but dangerous weapon that deprives a party of his day in court. While there are certainly situations in which such a motion is justifiably sustained, the courts have universally held that this is a procedure to be sparingly used and then only in the clearest of cases. Petitioners feel it is patent from the record in this case that there are serious questions of material facts which cannot be summarily disposed of and should be determined only after evidence has been heard as to the intention of the parties to the Purchase Agreement. In a substantial matter involving a great sum of money, Petitioners have been deprived of their day in court even though the Purchase Agreement, the pleadings and the affidavits filed in the District Court clearly demonstrate that there is ambiguity in the pertinent language on which Respondents relied in securing summary judgment. Petitioners think it clear that in using the language in question, the parties to the Purchase Agreement could not have intended the interpretation put upon the same by Respondents and accepted by the Courts below in sustaining the summary judgment.

Petitioners submit that the decision of the Court of Appeals is contrary to and in conflict with other decisions of that Court, of other U.S. Courts of Appeal and of this Supreme Court. Petitioners feel that the decision of the Fifth Circuit here opens the door for the granting of summary judgment in many cases even though there are clearly issues of material facts which may well exist in such cases.

The pertinent parts of the Purchase Agreement are set forth at pages 34 to 48 of the Appendix. (Reference to the Appendix [App.] is to the record of the case filed in the Court of Appeals and is part of the certified record filed herein.) The Purchase Agreement was lengthy and complex. The section of such Agreement setting forth events of default was itself lengthy and appears at pages 41 to 45 of the said Appendix. There are some twelve potential events of default and the one upon which Respondents base this suit is that described as Subparagraph A of Subparagraph (iii) of Paragraph (n) of the Purchase Agreement (App. 42).

The Allied-Fulton Agreement appears at page 51 of the Appendix and the paragraph providing for liquidation of Fulton appears at page 54.

Petitioners argued in the Courts below that there were ambiguities and inconsistencies in the Purchase Agreement, resulting in the language concerning adopting a plan of liquidation being subject to more than one interpretation. For example, Section 3(h)(i) of the Purchase Agreement (App. 42) permitted Continental to dispose of its business and assets by merger, liquidation or otherwise. This would not have been an event of default. It is inconsistent to say that the language in Section 3(n)(iii)(A) meant that the liquidation of Fulton—under any circumstances—would be an event of default. The Purchase Agreement specifically contemplated the possibility of a sale of Continental to Fulton (Section 3(h), (App. 38)). The sale of assets by Fulton (which included Continental) to Allied and the adoption of a plan of liquidation by Fulton was exactly what was contemplated in the Purchase Agreement and which would *not* have constituted an event of default had the sale been made by Continental itself.

Petitioners have consistently argued that the Allied-Fulton transaction is the type of situation contemplated when the Purchase Agreement was written and that the exception set forth in Section 3(n)(iii)(A) was meant to apply to such a transaction.

When the language concerning adoption of a plan of liquidation in Section 3(n) is placed *in the context of the entire Purchase Agreement*, and one considers the intention of the parties in making such Agreement, it is obvious that the parties do not intend that a plan such as Fulton adopted here should be an event of default. In loan agreements and earn-out contracts, it is customary to have default provisions protecting the creditor's security. If something adverse happens to that security, the creditor usually has an immediate right to accelerate payments and collect his debt.

In the instant case, B-M-G wanted the right to look to the business and assets of Fulton, the guarantor of Continental. Fulton could have merged into another company or sold substantially all of its assets (as could Continental) and there would have been no event of default. Here, the same result was achieved as in transactions permitted by the Purchase Agreement because B-M-G can still look to the same security it had before. It is only the *form* of the transaction between Allied and Fulton which has given Respondents the opportunity to assert that an event of default has occurred.

The point is that when Section 3(n)(iii)(A) is considered *in context of the entire Purchase Agreement*, the terms of such contract indicate that a literal interpretation of the words "adopt a plan of complete liquidation" does not make sense and is obviously not what the parties intended. It seems equally clear that what the parties actually did intend was to insure that the obligations of Continental and Fulton followed their respective business and assets and that a default would occur when the security was in peril. This deduction is further supported by the provision in the Purchase Agreement which permits the sale of Continental's assets if the purchaser assumes its obligations and the provision which permits liquidation of Continental into Fulton. There is no impairment of security by virtue of the Allied-Fulton transaction and to give Section 3(n)(iii)(A) the interpretation imposed on it by Respondents is contrary to the

practice in the commercial industry and to Section 1-208 of the Uniform Commercial Code.

The crux of the instant case is that in spite of this apparent ambiguity, a motion for summary judgment was granted. A reading of the Purchase Agreement indicates that it would be necessary to know the intention of the parties in order to understand what was meant by the use of the language "adopt a plan of complete liquidation". The other eleven events of default in the Purchase Agreement are characterized by serious financial failure, such as bankruptcy, which would normally entitle a creditor to accelerate payments. The particular "event of default" relied upon by Respondents could only be an "event of default" in any fair interpretation put upon the language if there was a liquidation because of the financial failure of Fulton. It was certainly not intended to make a liquidation of Fulton an "event of default" if Fulton was in fact strengthened by the transaction, thereby giving even greater security to B-M-G. It is acknowledged in the record that Allied is a listed company of substantial size (App. 136-137). B-M-G continued to have all the security it had before for the payment of its debt plus the added security of Allied. To put an interpretation on the liquidation of Fulton under these circumstances that the same constituted an "event of default" within the meaning of the Purchase Agreement is to distort the language in Section 3(n)(iii)(A).

As was stated earlier, the Courts have always underscored the fact that summary judgment is not proper in any case where there is any question that there are fact issues, material in nature, which must be determined. As this Honorable Court said in *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 82 S.Ct. 486, 7 L Ed.2d 458,

> "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice' ".

See also *Fortner Enterprises, Inc. v. United States Steel Corp., et al.,* at 394 U.S. 572, 89 S.Ct. 1252.

While the above cases dealt with antitrust litigation in which the intention of the parties is important, it is submitted that here we are dealing with a complex agreement, consisting of over 74 pages and in which the intention of the parties is controlling. As this Supreme Court has said in *Poller v. Columbia Broadcasting System, supra,* summary judgment is proper only when the pleadings, affidavits and documents in evidence show there is no general issue as to any material fact and that one of the parties is entitled to judgment as a matter of law.

It is fundamental that if language in an agreement is susceptible to more than one interpretation, extrinsic evidence must then be introduced to discern the intention of the parties. The courts have uniformly held that summary judgment is not an appropriate remedy under such circumstances.

In the case of *Lemelson v. Ideal Toy Corporation,* 408 F.2d 860 (2d Cir. 1969), the U.S. Court of Appeals reversed the holding of a district court that a contract was unambiguous. The Court of Appeals said

> "Summary judgment procedure, of course, is available only in cases where there is no genuine issue of material fact. Rule 56(c), Fed. R.Civ.P. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law where it is quite clear what the trust is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try.' *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.Ed. 967 (1944). On a motion for summary judgment, the court 'cannot *try* issues of fact but can only determine whether there *are* issues of fact to be tried.' *Empire Electronics Co. v. United States,* 311 F.2d 175, 179 (2d Cir. 1962). Since there was a triable issue of fact, summary judgment should not have been granted."

In the case of *Union Insurance Soc. of Canton, Ltd. v. William Gluckin & Co.*, 353 F.2d 946 (2d Cir. 1965), the district court granted summary judgment but the Court of Appeals reversed holding that a particular provision was ambiguous and raised an issue as to material fact of *intent* of the parties. In discussing Rule 56(c), the Court said,

> "Fed. R.Civ.P. 56(c) provides that judgment 'shall be rendered forthwith if the pleadings . . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'. . . . We hold that the phrase 'excluding customers, goods separately insured', when read *in context*, is ambiguous; that the ambiguity posed a genuine issue as to a material fact, namely, the parties' intent; and therefore, that summary judgment should not have been granted."

The Court of Appeals for the Fifth Circuit has likewise consistently held that written agreements must be free of ambiguity if extrinsic evidence to explain the same is not permitted to be introduced. Reference is made to *Fidelity-Phenix Fire Insurance Company v. Farm Air Service, Inc.*, 255 F.2d 658 (5th Cir. 1958). In such case, the U.S. Court of Appeals for the Fifth Circuit made the following statement:

> "Before we can hold with appellants that appellee was denied recovery as a matter of law we would have to be convinced that the insurance policies expressed an agreement which was clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout."

In *Brunswick Corporation v. Harold Vineberg, et al.*, 370 F.2d 605 (5th Cir. 1967), the Fifth Circuit used strong language in reversing the district court which had granted summary judgment. In discussing Rule 56(c), that Honorable Court said,

> "Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use."

In *Bushman Construction Company v. W. S. Conner, et al.*, 307 F.2d 888 (10th Cir. 1962), the Tenth Circuit reversed a district court that had granted summary judgment. The district court held a particular statement was unambiguous, complete on its face and could not be altered and explained by parol evidence. In reversing, the Court of Appeals said,

> "While it is the duty of the trial court to grant a motion for summary judgment in an appropriate case, the relief contemplated by Rule 56 is drastic, and should be applied with caution to the end that the litigants will have a trial on bona fide factual disputes. Under the rule no margin exists for the disposition of factual issues, and it does not serve as a substitute for a trial of the case nor require the parties to dispose of litigation through the use of affidavits."

This Honorable Supreme Court issued an order amending certain Rules of Civil Procedure on January 21, 1963. Among the Rules amended is Rule 56. Mr. Justice Black and Mr. Justice Douglas expressed objection to some of the Rules. One of the amendments to which these Honorable Justices expressed objection was an amendment to Rule 56(e) providing that a party opposing a motion for summary judgment must, by affidavit or otherwise, set forth specific facts showing that there is a genuine issue for trial. In expressing their dissatisfaction these two Honorable Justices made the following statement:

> "(c) The proposed amendment to Rule 56(e) imposes additional burdens upon litigants to protect against summary judgments rendered without hearing evidence on the part of witnesses who are confronted by the persons against whom they testify so that these persons can subject the witnesses to cross-examination. The summary judgment procedure, while justified in some cases, is made a handy instrument to let judges rather than juries try law suits and to let those judges try cases not on evidence of witnesses subjected to cross-examination but on ex parte

> affidavits obtained by parties. Most trial lawyers would agree, we think, that a litigant can frequently obtain in an actual trial favorable testimony which could not have been secured by affidavits or even by depositions."

It is respectfully submitted that the above referred to language is particularly applicable to the case at bar.

CONCLUSION

Petitioners sincerely contend the decision below is fraught with danger. It disturbs the well established rule that summary judgment should be granted sparingly and only when there is clearly no fact issue in the case. In the course of commercial transactions, there are many complicated agreements where language is susceptible of more than one interpretation. Often what the parties really meant can only be learned by having extrinsic evidence introduced. This is not needed where the contract is clear, definite and unambiguous. However, when apparent plain language brings about a ridiculous result, it becomes necessary to learn from the parties what was really meant. To brush all this aside by sustaining a motion for summary judgment and not learning the true intent of the parties is a dangerous practice. It is respectfully submitted that the decision below is contrary to well established decisions of the Supreme Court and to many Courts of Appeal. For these reasons, Petitioners respectfully request that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29174

B-M-G INVESTMENT COMPANY,
and DUNCAN BOECKMAN, Trustee,
Plaintiffs-Appellees,

versus

CONTINENTAL/MOSS GORDIN, INC.,
FULTON INDUSTRIES, INC., and
ALLIED PRODUCTS CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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(January 14, 1971)

Before GEWIN, MORGAN and ADAMS*,
Circuit Judges.

PER CURIAM: In this case appellees (as plaintiffs below) brought suit, alleging an event of default under a Purchase Agreement and seeking acceleration of maturity of the guaranteed part of an obligation,

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*Of the Third Circuit, sitting by designation.

requesting declaratory judgment as to interpretation of a provision of the Purchase Agreement and seeking attorneys' fees. In an opinion which discusses thoroughly the facts and issues of law, see ____ F. Supp. ____, the district court granted appellees' motion for summary judgment as to the Purchase Agreement in issue, holding that the rights of the appellees thereunder were clear and unambiguous, and further holding that the construction of the contract was for the court without resort to extrinsic evidence. We agree with the district court that the case was proper for summary judgment, but disallow the amount of $125,000 attorneys' fees as awarded by the court below.

A perusal of the record indicates that, although by the standards of most attorneys, the case constitutes "big litigation", it has to be borne in mind that there has been no trial in this case, no introduction of evidence or examination of witnesses except on the subject of attorneys' fees,[1] no protracted conferences or meetings between the counsel for the parties, and less than one day in the courtroom before summary judgment was granted.

We are cognizant that fees to be allowed attorneys is a matter for the sound discretion of the trial judge and should not be set aside unless an abuse of discretion is made plainly to appear. See *Connecticut Importing Co.* v. *Frankfort Distilleries*, 101 F. 2d 79.

However, appellate courts, as trial courts, are them-

[1]The opinion of three leading members of the Dallas Bar ranged from estimates of fees of $125,000 to $168,000.

selves experts as to the reasonableness of attorneys' fees, and may, in the interest of justice, fix the fees of counsel albeit in disagreement on the evidence with the views of the trial court. *Mercantile-Commerce B. & T. Co.* v. *S.E. Arkansas L. Dist.*, 8 Cir., 1939, 106 F. 2d 966, 972-73. Also, in *Campbell, et al.* v. *Greene*, 5 Cir., 1940, 112 F. 2d 143, this court observed that:

> "The court, either trial or appellate, is itself an expert on the question (of attorneys' fees) and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid or testimony of witnesses as to value."

Considering all the factors and from a review of the record, we conclude that the attorneys' fees in the amount of $125,000 awarded by the district court was excessive, and we hold that an allowance not in excess of $75,000 would be adequate and would fall within the bounds of moderation.

AFFIRMED IN PART AND REMANDED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1970

No. 29174

D.C. Docket No. CA 3-2665-C

B-M-G INVESTMENT COMPANY,
and DUNCAN BOECKMAN, Trustee,

Plaintiffs-Appellees,

versus

CONTINENTAL MOSS GORDON, INC.,
FULTON INDUSTRIES, INC., and
ALLIED PRODUCTS CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

---

Before GEWIN, MORGAN and ADAMS*, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; and remanded in part in accordance with the opinion of this Court;

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*Of the Third Circuit, sitting by designation.

It is further ordered that defendants-appellants be condemned to pay one-half of the costs on appeal to be taxed by the Clerk of this Court, and plaintiffs-appellees be condemned to pay one-half of said costs.

January 14, 1971

Issued As Mandate:

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption omitted in printing]

(February 19, 1971)

Before GEWIN, MORGAN and ADAMS,* Circuit Judges

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed by the appellants and the appellees in the above entitled and numbered cause be and the same are hereby DENIED.

---

*(Of the Third Circuit, sitting by designation).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption omitted in printing]

(STAY OF MANDATE)

ON CONSIDERATION OF THE APPLICATION of the appellants in the above numbered and entitled cause for a stay of mandate of this Court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty (30) days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty (30) days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty (30) days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 9th day of March, 1971.

/s/ Lewis R. Morgan
United States Circuit Judge

APPENDIX B

[Filed December 18, 1969]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS, TEXAS

B-M-G INVESTMENT COMPANY AND
DUNCAN BOECKMAN, TRUSTEE

VS.

CONTINENTAL/MOSS-GORDIN, INC.,
FULTON INDUSTRIES, INC. AND
ALLIED PRODUCTS CORPORATION

Civil Action No.
CA-3-2665-C

FINAL JUDGMENT

This matter having been heard by the Court on Motion of Plaintiffs for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure; and the Court having considered the pleadings filed in this action, the depositions on file herein, and the affidavits submitted in support of and in opposition to Plaintiffs' Motion for Summary Judgment, and having heard oral argument of counsel; and it having been made to appear to the Court that the Defendants were entitled to a credit in the amount of $86,667 against the principal amount sued for by reason of payment of that sum on April 11, 1969; and it appearing to the Court that no genuine issue as to any material fact exists and Plaintiffs are entitled to judgment as a matter of law upon all issues raised by Plaintiffs' Complaint, except as to the amount of attorney's fees which Plaintiffs are entitled to recover in this cause, and that Plaintiffs' Motion for Summary Judgment should be sustained, and an Interlocutory Judgment sustaining the same having been entered herein on November 11, 1969;

It is, accordingly, ORDERED, ADJUDGED and DECREED that Plaintiffs, B-M-G Investment Company and Duncan Boeckman, Trustee, do have and recover of and from the Defendants, Continental/Moss-Gordin, Inc., Ful-

ton Industries, Inc., and Allied Products Corporation, jointly and severally, the principal sum of $593,333, together with interest at the rate of 6% per annum on the principal sum of $680,000 from April 30, 1968 until April 11, 1969, and, at the rate of 6% per annum on the principal sum of $593,333 from April 11, 1969 until paid and all costs herein.

It is further ORDERED, ADJUDGED and DECLARED that under the provisions of the Purchase Agreement dated as of the 31st day of July, 1964 and described in Plaintiffs' Complaint, Plaintiffs are entitled to be paid by the Defendants, Continental/Moss-Gordin, Inc., Fulton Industries, Inc., and Allied Products Corporation, pursuant to the provisions of said Purchase Agreement and in addition to the sums hereinabove awarded Plaintiffs, all sums (if any) that may be or become due under the provisions of Section 3 of the Purchase Agreement in respect of the earnings of the Defendant, Continental/Moss-Gordin, Inc., for its fiscal year ended in 1968 and for subsequent fiscal years, until the sum provided to be paid Plaintiff, B-M-G Investment Company, under the provisions of Section 2(a)(ii) and Section 3 of the Purchase Agreement has been fully paid or until expiration of the Purchase Agreement according to its terms.

The matter as to the amount of attorney's fees which Plaintiffs are entitled to recover in this cause having been tried to the Court; and the Court having heard and considered testimony offered by the parties and argument of counsel; and it appearing to the Court that Plaintiffs are entitled to recover their attorney's fees in this cause and that the sum of $125,000 is a reasonable fee for services rendered in this cause to the date hereof;

It is, accordingly, ORDERED, ADJUDGED and DECREED that Plaintiffs do further have and recover of and from the Defendants, jointly and severally, reasonable

attorney's fees in the amount of $125,000; for all of which judgment, attorney's fees and costs let execution issue.

DATED December 18th, 1969.

/s/ W. M. Taylor
District Judge

SUPREME COURT, U. S.

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Petitioners,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, B-M-G Investment Company and Duncan Boeckman, Trustee, respectfully submit this Brief in opposition to Petitioners' Application for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

STATUTORY PROVISIONS INVOLVED

Rules of the Supreme Court of the United States, Rule 56(2) and (4) read as follows:

> "2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have

been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment."

"4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

REASONS WHY THE WRIT SHOULD BE DENIED

A less appropriate case in which to invoke the jurisdiction of this Court can hardly be imagined. The sole question presented is whether or not there is ambiguity in a particular provision of a contract between businessmen. Four judges of the federal judicial system have agreed that the provision is without ambiguity. Petitioners now seek to have the nine justices of this Honorable Court examine the contract in question and vote upon the question of its ambiguity. Thirteen justices in all.

Petitioners refer generally to conflicts between the decisions of the District Court and Court of Appeals, in this case, and other decisions in the federal judicial system. However, they do not direct the Court's attention to a single conflicting decision.

The truth is no conflict of decisions exists; the decisions within the federal system and, for that matter, among the state courts, are in harmony. The law is clear:

> If a contract is unambiguous its construction is for the Court, extrinsic evidence is neither relevant nor admissible, and the matter can appropriately be disposed of by summary judgment.

If, on the other hand, the contract is ambiguous, extrinsic evidence is proper to determine its meaning, a fact issue is raised by the ambiguity, and the case cannot be disposed of by summary judgment.

District of Columbia:

Simpson Bros., Inc. v. District of Columbia, 179 F. 2d 430 (Ct. App., D.C., 1949) *Cert. denied,* 338 U.S. 911, 94 L. Ed. 561, 70 S. Ct. 350;

Second Circuit:

Boro Hall Corporation v. General Motors Corporation, 164 F. 2d 770 (Second Circuit, 1947);

Third Circuit:

New Wrinkle, Inc. v. John L. Armitage & Co., 238 F. 2d 753 (Third Circuit, 1956);

Fifth Circuit:

Freeman v. Continental Gin Company, 381 F. 2d 459 (Fifth Circuit, 1967); *Green v. Valve Corporation of America,* 428 F. 2d 342 (Seventh Circuit, 1970)

Sixth Circuit:

Gesing v. Grand Rapids Hardware Company, 362 F. 2d 363 (6th Cir., 1966)

Seventh Circuit:

Brekken v. Readers Digest Special Products, Inc., 353 F. 2d 505 (Seventh Circuit, 1965)

Eighth Circuit:

Universal Fiberglass Corporation v. United States, 400 F. 2d 926 (Eighth Circuit, 1968); *Elbow Lake Coop. Grain Co. v. Commodity Credit Corp.*, 251 F. 2d 633 (Eighth Circuit, 1958)

Ninth Circuit:

Airborne Freight Corporation v. McPherson, 427 F. 2d 1283 (9th Cir., 1970)

Tenth Circuit:

Brodrick v. Gore, 224 F. 2d 892 (10th Cir., 1955)

Court of Claims:

Perry and Wallis, Inc. v. U. S., 427 F. 2d 722 (Court of Claims, 1970)

Accordingly, the propriety of summary judgment is entirely dependent on the existence or nonexistence of an ambiguity. This is the sole issue and it has been correctly decided by the United States District Judge and by the judges of the Court of Appeals.

The decisions of the courts below do not enunciate any new or startling principles of law. The memorandum opinions of the courts below are wholly without precedential value.

No constitutional questions are involved. The case involves no construction or interpretation of state or federal statutes.

The decision of the courts below do not conflict with any decision of another court of appeals or of this Honorable Court. The case meets none of the criteria of Rule 19, Rules of the Supreme Court of the United States, 28 U.S.C.A.

The case is wholly inappropriate for consideration by this Honorable Court.

At the time of filing this Brief Respondents have filed a Motion for Damages For Delay under the provisions of Rule 56(2) and (4) of the Rules of the Supreme Court of the United States, and Respondents respectfully request that this Brief be also considered as a brief in support of said motion.

This is a suit for acceleration of the maturity of indebtedness because of a default which occurred on April 29, 1968. For nearly three years Petitioners have withheld money that rightfully belongs to Respondents, and this during the period of tightest money and highest interest rates.

Petitioners have financed their protracted defense at the expense of Respondents, who have been deprived of interest at current rates on their money. Petitioners have avoided their obligation on the flimsiest of grounds. They have employed the federal judicial system as an instrument to gain delay. They have done this at the time that the federal judiciary is struggling to cope with the "ever-growing explosive increase in the amount of judicial business." Opinion of Chief Judge Brown in *N.L.R.B. v. Amalgamated Clothing Workers of America*, 430 F. 2d 966 (5th Circuit, 1970).

The Supreme Court has not been exempt from the "ever-growing explosive increase" in judicial business. The docket number of this case suggests that during this term of court 1,561 cases have been docketed in the Supreme Court — more than 173 appeals for each justice of the court.

Rule 56 provides the Court a tool to discourage litigants from overburdening the Court's crowded docket with frivolous appeals. In *Whitney v. Cook*, 99 U.S. 607, 25 L. Ed. 446, 9 Otto. 607 (1879) the Court said:

> "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages * * * Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

The Supreme Court has, in a number of cases, adjudged damages as compensation where the appeal or application for certiorari were deemed frivolous. See, *e.g. Texas and Pacific Railway Company v. Prater*, 229 U.S. 177; 57 L. Ed. 1139; 33 S. Ct. 637 (1913) (10% of the judgment); *Wagner Electric Manufacturing Company v. Lyndon*, 262 U.S. 226; 67 L. Ed. 961; 43 S. Ct. 589 (1923) (an allowance of $1,500 on a $12,000 judgment); *Deming v. Carlisle Packing Company*, 226 U.S. 102; 57 L. Ed. 140; 33 S. Ct. 80 (1912) (5% of the amount of the judgment); *Sutton v. Bancroft*, 64 U.S. 320; 16 L. Ed. 454; 23 How. 320 (1860) (10% of the judgment); *Jenkins v. Banning*, 64 U.S. 445; 16 L. Ed. 580; 23 How. 455 (1860) (10% of the judgment).

Respondents' judgment is in the amount of $593,333, together with interest at the rate of 6% per annum on the principal sum of $680,000 from April 30, 1968 until April 11, 1969, and at the rate of 6% per annum on the principal sum of $593,333 from April 11, 1969 until paid.

There is now due and owing to Respondents the sum of $696,757.70, including principal, interest accrued thereon to April 1, 1971, and attorneys' fees allowed by the Court of Appeals.

For the protection of the Court's docket and to compensate Respondents for the delay resulting from Petitioners' frivolous appeal, damages in the amount of 10% of the judgment should be allowed.

CONCLUSION

The decision of the lower courts involved no constitutional issue, no interpretation of statute and does not conflict with decisions of other courts in the federal system. The case involves a private commercial dispute between businessmen; its determination was governed by local law of common and usual application. The decision of the issues involved has no precedential value whatsoever. Petitioners' Application for Writ of Certiorari is frivolous and is made solely for the purpose of delay. It is respectfully submitted that the Petition for Certiorari should be denied and Respondents should

be allowed damages for delay in the amount of 10% of the amount due in respect of its judgment.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1561

CONTINENTAL/MOSS-GORDIN, et al.,
Petitioners,

v.

B-M-G INVESTMENT COMPANY, et al.,
Respondents.

MOTION OF RESPONDENTS FOR DAMAGES FOR DELAY

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MOTION OF RESPONDENTS FOR DAMAGES FOR DELAY

Respondents, B-M-G Investment Company and Duncan Boeckman, Trustee, respectfully move the Court to adjudge to the Respondents reasonable damages for the delay occasioned by Petitioners' Application for Certiorari, and as grounds therefor, would show:

1.

That on the 8th day of April, 1971 Petitioners filed herein their petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

2.

No reasonable basis exists for invoking the jurisdiction of the Supreme Court. The decisions of the courts below were correct and the case is wholly inappropriate for consideration by the Supreme Court. Petitioners' application for writ of certiorari is frivolous and is made solely for the purpose of delay.

3.

Under the provisions of Rule 56(2) and (4) of the Rules of the Supreme Court of the United States this Court may, and, it is submitted, should adjudge to Respondents damages for the delay occasioned by Petitioners' frivolous application for writ of certiorari.

4.

Respondents' judgment is in the amount of $593,333, together with interest at the rate of 6% per annum on the principal sum of $680,000 from April 30, 1968 until April 11, 1969, and at the rate of 6% per annum on the principal sum of $593,333 from April 11, 1969 until paid. There is now due and owing to Respondents the sum of $696,757.70, including principal, interest accrued thereon to April 1, 1971, and attorneys' fees as allowed by the Court of Appeals.

5.

At the time of filing this motion Respondents have filed herein their Brief in opposition to such Petition for Writ of Certiorari. Respondents respectfully request the Court to consider such Brief as a brief in support of this motion.

CONCLUSION

Respondents respectfully pray that Petitioners' application for writ of certiorari be denied and that Respondents be allowed damages for delay in the amount of 10% of the amount due in respect of their judgment, or for such other amount as the Court may deem just.

Respectfully submitted,

Original Signed by
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